United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

76-7247

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants, et al.,

Plaintiffs-Appellees,

v.

FORWOOD CLOUD WISER, JR., and
RICHARD E. NEUMAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

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Statement

The Plaintiffs-Appellees' Answering Brief is separated into three parts. Point I deals with the liability of an employee for negligence at common law. Point II, subdivisions A through E, deal with plaintiffs' views of the Warsaw Convention Treaty. Point III is intended as an answer to "other arguments" of defendants. In this Reply Brief, defendants-appellants will consider these points in the same order listed in plaintiffs' brief.

Reply Argument to Appellees' Point I

Defendants have no serious quarrel with Point I of plaintiffs' brief. Defendants have never argued that an employee was not liable for the damage he negligently causes. While such may be the law, in theory, the issue of defendants' *liability* is not the issue before this Court. The issue—the *only* issue—is that stated on page 1 of appellants' brief, i.e., whether the employees are entitled to the protection of the treaty's *limitation* for any liability they may have.* The fact that the Government may not be liable under the Federal Tort Claims Act for a tort committed by one of its employees because the tort is one excepted by the Act has no relevance here. The sovereign can impose any condition it wishes when it consents to be sued.

Reply Argument to Appellees' Point II

A. Plaintiffs rely on two cases to support their contention that the Treaty should be strictly construed. Neither is inconsistent with defendants' position. The first case is *The Amiable Isabella,* 19 U.S. 1 (1821). The Treaty in question there required that the ship be furnished with a sea-letter or passport containing certain information necessary to enable a boarding party to determine if contra-

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* It should be noted that there is a serious question as to the possible liability of these employees. The Court below recognized this possibility and the necessity for a later determination of this issue (A293-294). The Complaint alleges nonfeasance on the part of these employees who performed their duties at T.W.A.'s corporate headquarters in New York City. Under New York law, they could not be held liable for this alleged nonfeasance (A7, §§ 4-6). See, *Michaels* v. *Lipenard Holding Corp.*, 11 A.D. 2d 12 (1st Dept. 1960); *Jones* v. *Archibald,* 45 A.D. 532 (4th Dept. 1974); *Lutz Feed Co., Inc.* v. *Audet & Company, Inc., et al.,* 72 Misc. 2d 28 (1972); 2A *Warren's Negligence,* § 3.03, pp. 50-55.

band was aboard in situations where either party to the treaty was at war. No form of passport was annexed to the Treaty, as was required, thus making it impossible to compare the passport seized aboard ship with the passport form of the Treaty. The Supreme Court said:

> "In point of fact no form of a passport was made out and annexed to the treaty. The case, then, now before us, is not within the letter of the treaty, for as no form is prescribed, the documents found on board cannot be compared with any form; and until that comparison is made, it is impossible to say, whether the stipulations originally intended by the treaty have been exactly and literally complied with or not. *There is no room here left for interpretation,* on account of the ambiguous language of parties. *They have expressed themselves in the clearest manner,* and it is to the passport, whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive or *prima facie* evidence of proprietary interest, is attributed."
> 19 U.S. at 69-70 (Emphasis added.)

The Court continued that it did not know why the passport form was not annexed to the treaty but said that it could not judicially supply it. The Court then continued with the language quoted in plaintiffs' brief, p. 7. As the above language and the language of the Court appearing right after plaintiffs' quote show, the problem facing the Supreme Court was quite different from the issue in this case.

The second case is *Rocca* v. *Thomson,* 223 U.S. 317 (1912), wherein the Court also observed that:

> "Like other contracts, [treaties] are to be read in the light of the conditions and circumstances existing at the time they were entered into, *with a view to effecting the objects and purposes of the States thereby*

> *contracting. In re Ross, Petitioner,* 140 U.S. 453, 475." 223 U.S. at 331-332. (Emphasis added.)

In considering those objects and purposes the Court held that "there was no purpose" in the treaty to take away from the States the right to local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit them to the consuls of such foreign nations. 223 U.S. at 334. If anything, *Rocca* supports defendants' position. Reading the instant Convention in the light of the conditions and circumstances existing at the time and with a view to effecting the objects and purposes of the contracting states, it must be concluded that these parties never intended to place corporate employees in a less advantageous position than their corporate employer.

Plaintiffs, as well as Judge Frankel, place great weight to support their position on *Herd & Co.* v. *Krawill Machinery Corp.,* 359 U.S. 297 (1959). Plaintiffs' emphasis of this decision merely highlights one of the reasons why defendants deemed it necessary in their brief (p. 8, fn.) to underscore the fact that in this appeal we are dealing with *employees* of the carrier, and not agents. While all employees can be agents when functioning in the course of their employment, it is clear that all agents are not employees. The *Herd* case is but one illustration of the latter. In *Herd,* the agent, "an independent stevedoring company, was orally *engaged* by the carrier to load the cargo aboard the ship" 359 U.S. at 298 (emphasis added). Moreover, as the Supreme Court explicitly stated with respect to the legislation before it:

> "The Act is clearly phrased. It defines the term 'carrier' *to include* 'the owner or the charterer who enters into a contract of carriage with the shipper.' § 1301 (a)." 359 U.S. at 301 (Emphasis added.)

Thus, even if the *Herd* case involved an employee, instead of an independent company agent, it would still afford no

authority for the proper interpretation of a treaty which is not "clearly phrased" and which does not define "the term carrier" at all. The language of the Supreme Court cannot be considered separate and apart from the words of the legislative enactment it was construing. Yet, this is exactly what the plaintiffs and the lower court have done in proclaiming *Herd* as dispositive of the issue presented to this Court.

Whether plaintiffs' counsel do not understand the distinction between an employee-agent and a non-employee agent, or whether they merely choose to close their eyes and ignore it, the fact remains that a substantial distinction exists. In *Restatement of the Law of Agency*, 2d, Title B Torts of Servants, pp. 477-481, there is set forth in the Introductory Note the historical background of this distinction. One excellent illustration (of several) distinguishes between a servant and a non-servant agent. It states, p. 479:

> "*Servant distinguished from non-servant agents.* Another way to contrast the servant with the non-servant agent is to say that the servant is one within the personal or business household of the principal, whereas the non-servant is on the outside. The servant is, thus an integral part of his master's establishment; the non-servant aids in the business enterprise but is not a part of it. Because the servant is an internal element of the establishment, it is normal for the head of the enterprise to control his physical acts and also the time when he is to act for the enterprise. Primarily, the servant sells his personal services, submitting to control as to his physical activities and the use of his time. The non-servant agent agrees sometimes to render services and sometimes to achieve results, but he does not surrender control over his physical actions. Household servants and full time employees of a business are typical of the servant group; factors, brokers and attorneys at law represent

> the non-servant type of agents. These are to be distinguished from other non-servants who are employed to do work but not in a fiduciary capacity and who can be classified as non-agent independent contractors."

It is submitted therefore that *Herd* is not as the lower court considered it to be, "a highly persuasive analogy opposing the view of the defendants before us" (A290).

B. In subdivision B of Point II, plaintiffs argue that the Warsaw delegates *specifically intended to exclude* the employees from the benefit of the limitation. They support this argument by quoting the Polish delegate (Pltfs'. Brief, p. 10) to the effect that the issue of the "legal status of the captain of the aircraft and of the personnel", among other topics, would be dealt with at future conferences. Plaintiffs' counsel conclude in their brief (pp. 10-11) that "the Warsaw drafters and delegates did not intend to cover the liability of employees." A more accurate title for that study is the "Legal Status of the Aircraft Commander", for that is the title actually given to the draft of that Convention.

The "legal status" of the Aircraft Commander is not synonymous with limitations of liability, particularly in view of the fact that there already was in existence a Convention dealing with limitations of liability. Even if the plaintiffs' views were accepted—that the carriers' employees were not covered—why would it have been necessary to call a separate convention just for the purpose of including the employees when an amendment (like the Hague Protocol) would suffice? The simple answer to that question is that the draft convention of the "Legal Status of the Aircraft Commander" was not intended to and in fact has absolutely nothing whatever to do with his liability or any limitation thereof. In fact, it does not even apply to the pilot or other flight crew members. If plaintiffs' counsel had taken the time to read it they would not have been so enthusiatic about the Polish delegate's remarks.

The 1946 draft of the "Legal Status of the Aircraft Commander" convention is printed in English in 14 J. Air Law & Comm., 84-86 (1947). A revised draft of this convention was prepared in 1947 by the Paris Legal ad hoc Committee of the International Civil Aviation Organization, ICAO Doc. 4006; also printed in Kamminga, *The Aircraft Commander in Commercial Air Transportation,* Appendix 171 (1953). *Neither draft refers to the question of liability or limitation of the Aircraft Commander.* Thus, plaintiffs' argument that the subject of the employee's liability and limitation thereof were subjects to be covered by future conventions (Appellees' Brief, pp. 10, 11 fn.) is totally without merit.

Plaintiffs' quote of De Vos (p. 13) is nothing more than a broader paraphrase of the Treaty's Preamble and is consistent with the statement of the Polish delegate, *Warsaw Minutes,* 14, previously referred to.

C. In Subdivision C of their brief (pp. 14-19), plaintiffs' argue that it was the *specific intent* of the Warsaw delegates, gleaned from certain language in Articles 20-25 of the Treaty, to exclude any reference to employee liability. Plaintiffs say (p. 15):

> "There is nothing in any part of Warsaw which imposes liability on an employee or an agent of the carrier or in any way deal with issues of employee liability. The omission of a provision declaring an employee to be liable is critical."

In effect, the plaintiffs argue that these delegates deliberately left a loop-hole in the Convention which would permit a plaintiff to avoid the Convention limitation by the simple expedient of suing the negligent employee rather than the corporate employer. We find this hard to believe. Plaintiffs' counsel attempt to support this conclusion by a selective reading of Articles 20 through 25 of the Treaty. Their approach is nothing more than the blatant

use of a straw man created to avoid discussing the only issue involved in this appeal—the issue of the employees' right to the limitation, not their possible liability. The imposition of liability is not a *sine qua non* to the employees' right to the limitation. There is no requirement in law that a liability be imposed before a limitation of that liability will be allowed. State wrongful death statutes containing limitations on damages are examples of this. Even the Hague Protocol, Article 25A, did not impose liability on the employee when the limitation was *specifically* provided for. Thus,

> "Article 25A
>
> 1. If an action is brought against a servant . . . [he] shall be entitled to avail himself of the limits of liability . . ." (Appellants' Brief, Add. 20)

It further provides in subdivision 3 that this limit will not apply "if it is proved that the damage resulted from an act or omission done with the intent to cause damage or recklessly and with knowledge that damage would probably result".

In *Aeronautical Statutes and Related Material* (C.A.B., 1974) page 488 lists the Articles of the Treaty *imposing* the liability on the carrier (17 through 19). On the facing page, 489, it indicates the comparable amendments in the Hague Protocol. As the Court will see, none of the articles of the Treaty imposing liability on the carrier were amended to include the employees. Article 25A merely provides for the limit, *if* an action is brought against the employee, and the circumstances under which that limit will not apply. Since, therefore, neither the Convention nor the Hague Protocol deals with the subject of the employee's *liability,* and defendants do not contend otherwise, the arguments made by plaintiffs in Subdivision C of their Brief are irrelevant.

Moreover, even assuming *arguendo* that plaintiffs' acrobatic interpretations of Articles 20-25 do "establish" that the Warsaw delegates *specifically intended* the result claimed by plaintiffs, why is there such a complete silence on the subject in the Warsaw Minutes? It would certainly be likely that such an important matter as the employee's liability and his right to the limitation would have been alluded to at the Warsaw Conference, particularly in view of the fact that the matter was so thoroughly discussed with varying degrees of opinion by the delegates in the subsequent conferences of the Rome, Hague, Guadalajara and Guatemala Conventions and Protocols, as well as by the numerous aviation authors voicing opinions on the subject. Added to this is plaintiffs' admission that the "Warsaw drafters were renowned legal experts and knew that an employer and employee were independently liable under the civil and common law systems" (Pltfs'. Brief 13). Surely, such experts, with such knowledge, would have raised this point at Warsaw *if they had thought of it.* Surely, Ambrosini and Riese, the Italian and German delegates at the Warsaw Conference,* whose strong contrasting views illustrate the positions of each side of this issue, would have said something on the subject *if they had been aware of the problem.* This is particularly fortified by Ambrosini's position, that "he had always thought . . ." One would assume that if any delegate at the Warsaw Conference had so much as hinted at the issue of employee liability-limitation Ambrosini (as well as Riese) would have had *something* to say about the subject. Yet, an examination of the Warsaw Minutes indicates a complete silence on this issue.

Judge Frankel's observation was that there was no "deliberate" attention to the question. This Warsaw silence

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* They were the only Warsaw delegates who also participated in the Hague Conference. See, *Warsaw Minutes,* 7; cf. *Hague Documents,* Vol. II, pp. 19, 22.

when contrasted with the numerous *post* Warsaw opinions leads only to the inescapable conclusion that the delegates were not aware of a problem "which they would have wished to resolve if they had been aware of it." *Husserl* v. *Swiss Air Transport Co., Ltd.*, 388 F. Supp. 1238, 1246 (SD NY 1975).

D. In subdivision D of appellees' Point II, their counsel indulges in *post* Warsaw head counting to support their position. As defendants made perfectly clear (Appellants' Brief p. 24), there were differences of opinions on the question during the course of the Hague Protocol meetings. The quotations representing the views of the Belgian, German and United States delegations (Appellees' Brief 22-23) allude to the liability in tort of the employees. However the issue before this Court *is not liability but rather the defendants' right to the same monetary limitation as their employer.* Professor Riese's view (Appellees' Brief p. 23) must be read in the context of the law of Germany on the subject. The German Air Traffic Act, 1936 as amended in 1943, which sets forth the principles of the Warsaw Convention, provided in § 29e(2) that "the legal provisions which impose liability upon the commander of the aircraft or upon any other person remain unaffected." See, Drion, *Limitation of Liabilities in International Law,* ¶ 138, p. 159. Thus, Riese's view can be explained by the fact that the law of Germany was contrary to the tenor of Article 25A of the Hague Protocol.

Contrary to plaintiffs' contention (p. 25), defendants are not requesting this Court to "rewrite" the Treaty, but to merely interpret it as was done in a similar situation where the Court was called upon to determine if charter flights were subject to the Treaty's provisions. *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir., 1967), cert. den. 392 U.S. 905.

E. As previously indicated in appellants' brief, the case law on the subject is limited to the *Pierre* decision. Other cases, *Scarf, Stratton, Hoffman, Chutter* and *Wanderer,* referred to in both briefs, do not render any authoritative determination on the issue before this Court. They are, as appellants' brief indicated (p. 12) "non-informative". It can be confidently stated that the issue on the within appeal is one of first impression in this Court, or any other United States Court for that matter, *Pierre* included considering the total lack of discussion of the issue in that case.

The only other comment defendants have concerning Subdivision E of Point II is plaintiffs' attorneys remark in their brief (p. 32) that Drion "can hardly be considered an impartial interpreter of the Convention" because he was "legal counsel to KLM." Defendants' counsel can only wonder if plaintiffs' attorneys would have made this remark if they had read more carefully some of the sources they relied on. See, *II Hague Documents* 26, ICAO Doc. 7686-LC/140.

Reply Argument to Appellees' Point III

This Point continues, in a much more subdued manner than in the Court below, the attack on the Treaty's limits. At the same time appellees ignore the authorities and arguments set forth in Appellants' Brief Point II. None of the authorities cited in Appellants' Brief Point II are referred to, discussed or distinguished in Appellees' Brief Point III. Rather Appellees continue to argue the supremacy of common law over the Treaty and urge that even if they are incorrect in this argument, the airlines are no longer "infants" and are not entitled to protection originally considered to be a necessity (p. 35).

The only other statement worth noting is the surprising observation (p. 37) that the Executive Branch of the Government does not make public policy—only *foreign* policy.

If this is true, then one can search in vain in the Statutes at Large and find only Congressional Statutes and *domestic* policy—but not public policy.

The *Amicus* Brief

This brief contends that the Treaty is limited, silent and ambiguous (p. 3-4). To this can be added obscure and incomplete, 1 Shawcross & Beaumont, *Air Law*, 43 (1966). With all these deficiencies *Amicus* nevertheless contends (p. 13) that the language of certain articles of the Treaty "clearly show" that "in the minds of the drafters" agents were not included in the term "carrier". The *Amicus* does not address himself to the issues before this Court—whether the *employees* have the protection of the *limitation*. Instead, another straw man is created—the "liability" of the "agents" of the carrier. In short, the *Amicus'* brief is devoted almost entirely to arguing against the footnote on page 8 of Appellants' Brief.

What has been said herein concerning Appellees' brief applies equally to the *Amicus'* brief since the latter is merely a shorter version of the former.

One additional point should be mentioned concerning the comment of the *Amicus'* attorney about *Pierre* (bottom of page 5 of their brief) that "It is misleading to attempt to impugn the authority of *Pierre* on the grounds that it was not appealed and that it was settled."* As the footnote on page 13 of Appellants' Brief points out, Judge Meany, in deciding the other issue before him in that case (whether at common law a party had a right to trial by jury on the question of damages), pointedly ignored a

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* *Pierre* represents no binding authority on this Court, not because it was not appealed, but because of the total lack of discussion, interpretation or support for its single short paragraph disposition of such an important issue.

Third Circuit Court of Appeals reversal of an earlier decision of his on the identical issue. Insofar as the pilot-limitation issue decided by Judge Meany was concerned the appellants' purpose was, of course, to impugn the authority of *Pierre*. Appellants are not alone in that view, however. It appears that the *Amicus'* attorneys are also attempting to "impugn the authority of *Pierre*." In the case of *Mascher, et al.* v. *Varig Airlines, et al.* (N.Y. County Clerk Index No. 10699/74) which is presently on appeal to the New York Supreme Court, Appellate Division, 1st Department, and noticed for the October 1976 Term of that Court, the attorneys for the *Amicus* herein also represent the appellant in the *Mascher* appeal and are appealing from a dismissal under Article 28 of the Warsaw Convention. Among the numerous points raised in their brief is a contention that the Treaty is unconstitutional because it deprives plaintiff of a right to a trial by jury on the issue of damages. Opposed to this contention is, of course, Judge Meany's decision in *Pierre*. The *Amicus'* attorneys' answer to this is to "impugn the authority of *Pierre*." Thus, at pages 42-43 of their *Mascher* brief, the attorneys for the *Amicus* say:

> "There is one case which holds that at common law a party had no right to have his damages determined by a jury. *Pierre* v. *Eastern Airlines, Inc.*, 152 F. Supp. 486 (D.C. N.J. 1957). However Judge Meany of the New Jersey federal court, who wrote the opinion in *Pierre,* did not cite a single case in support of his holding nor had he done so in his decision in the *Smyth Sales* case in the lower court, where he held earlier that there was no right to have damages assessed by a jury at common law. Notwithstanding the Third Circuit's language in the *Smyth Sales* case, Judge Meany refused to recognize the binding decision of his own appellate court, as well as the U.S. Supreme Court decisions on the subject, when the question was

again presented to him 13 years later in the *Pierre* case; instead, he went off on his own, setting forth his own view without citing a single case or authority to support such a view. It is submitted that his decision in *Pierre* concerning a party's right to have damages assessed by a jury in a common law action is clearly wrong . . ."

CONCLUSION

The Order of the District Court should be reversed and this cause remanded for further proceedings.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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Plaintiffs-Appellees,

against

FORWOOD CLOUD WISER, JR., and
RICHARD E. NEUMAN,

Defendants-Appellants.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 14th day of October, 1976, he served two copies of the Reply Brief of Appellant on Kreindler & Kreindler, Esqs.

the attorneys for the Appellees by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 99 Park Avenue, New York ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
14th day of October, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978